Petition

81-1396

No._____

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IN THE

Supreme Court of the United States

October Term, 1981

JOHN THOMAS SCULL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Question Presented

If an individual, other than the original signor of a traveler's check, countersigns the name of the original signor *with his permission*, is there a "false writing" and a forgery under 18 U.S.C. §2314?

Parties

United States of America, Plaintiff-Respondent.

John Thomas Scull, Defendant-Petitioner.

James Daniel McGovern, Co-Defendant.

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit was published in slip opinion Nos. 81-1606 and 81-1607, filed October 5, 1981. This opinion is reprinted in this petition as Appendix A. It has not yet been officially reported.

The opinion of the United States District Court for the Western District of Pennsylvania is reported at 505 F. Supp. 195 (W.D. Pa. 1981) and is reprinted in this petition as Appendix B.

The order of the United States Court of Appeals for the Third Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* is reprinted in this petition as Appendix D.

Jurisdiction

The United States Court of Appeals for the Third Circuit affirmed the conviction of petitioner Scull on October 5, 1981, and denied petitioner Scull's Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 27, 1981. Pursuant to Rules 20.1, 20.4 and 29.1 of the Rules of the Supreme Court of the United States, the time for filing a petition for a Writ of Certiorari began to run on November 27, 1981 and expires on January 26, 1982.

28 U.S.C. §1254(1) gives the Supreme Court of the United States jurisdiction to review judgments of courts of appeals by writ of certiorari.

Statute Involved

18 U.S.C. §2314

. . .

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature;

. . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

IN THE

Supreme Court of the United States

October Term, 1981

No. _____

JOHN THOMAS SCULL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I. Statement of the Case

The findings of fact in this case describe a scenario which has been dubbed "CITISCAM" by the Third Circuit panel.[1] *See United States v. McGovern,* Nos. 81-1606 and 81-1607 (3rd Cir. October 5, 1981) (attached). The latter part of this title is based on a "novel" and "fascinating" plan of fraud involving traveler's checks; the former part of the title is based on the target of the alleged scam—Citibank Corporation. *Id.* According to the district court, Scull's co-defendant, James McGovern, purchased $2,400 in traveler's checks with money provid-

[1] For purposes of this petition, the trial court's findings of fact and the appellate panel's acceptance of these facts are not contested.

ed by Scull, and gave Scull permission to cash and countersign the checks. McGovern gave his driver's license to Scull, and Scull practiced imitating McGovern's signature in order to facilitate the check cashing process. Petitioner Scull was to keep the cash received for the traveler's checks as payment of a debt.

Scull and McGovern then travelled from Niagara Falls, New York to Erie, Pennsylvania, and Scull cashed the traveler's checks while in the Keystone State. The checks were then forwarded to New York, New York for ultimate collection. In the meantime, McGovern notified the local police that the traveler's checks had been stolen from his car, and Citibank issued replacement traveler's checks to McGovern based on his theft report.

After "CITISCAM" was uncovered by law enforcement agents, Scull and McGovern were charged with violating 18 U.S.C. §2314, which, among other things, provides criminal sanctions for whomever

> with unlawful or fraudulent intent, transports in interstate or foreign commerce any travelers' checks bearing a forged countersignature.

Both defendants were tried in the United States District Court for the Western District of Pennsylvania, jurisdiction based on 18 U.S.C. §3231. Both defendants were convicted, and sentenced to five years imprisonment. Both defendants appealed their convictions and a panel of the United States Court of Appeals for the Third Circuit affirmed. Petitioner Scull's Petition for Rehearing and Suggestion for Rehearing *En Banc* were then denied by the Third Circuit.

II. REASON FOR GRANTING THE WRIT:

The Circuit Court panel erred in finding that a different definition of forgery should be applied to traveler's checks than is applied to other documents.

A. Introduction

> Rid ourselves of forgers we must, but let our convictions be forged by law and not counterfeited with irrational inferences and irrelevant presumptions.
>
> *United States v. Owens*, 460 F.2d 467, 471 (8th Cir. 1972)

> Undoubtedly the defendant may be successfully prosecuted under some penal statute in some jurisdiction, but the facts do not make out a case under the statute upon which the indictment was based.
>
> *Greathouse v. United States*, 170 F.2d 512, 514 (4th Cir. 1948)

In our system of criminal justice, conduct must be both culpable and proscribed by the particular statute under which the defendant was indicted for a conviction to stand. *See United States v. Grissom*, 645 F.2d 461 (5th Cir. 1981). Whether the conduct of John Thomas Scull was culpable turns on a question of fact, and a determination of culpability below may well have been warranted by a reasonable interpretation of the evidence.

However, it is clear that the behavior of Scull was not proscribed by the statute under which he was charged, and the decision of the panel of the United States Court of Appeals for the Third Circuit ignores this tenet and defies logic and case law. Reversal of John Scull's conviction is necessary to maintain the vigil that prevents a court from permitting mere culpability to invade the purity of the criminal process and to influence the trier

of fact in applying the penal statute. It is respectfully submitted that the failure of the appellate panel to maintain this vigil in the case at bar requires review and reversal by the United States Supreme Court.

The central issue in this case is whether the traveler's checks which were transported in interstate commerce bore "forged" countersignatures, and hence evidenced criminal activity as defined by the statute. Since the traveler's checks had been *countersigned with permission of the original signor*, both conceptually and precedentially, no forgery could possibly have been committed. However, the Third Circuit panel found that because traveler's checks are somehow "unique", another person who countersigns the original signor's signature—even with the permission of the original signor—may have committed a forgery. Since this holding contravenes both the case law and common sense, it is respectfully urged that the decision of the panel be reviewed by this Court and that the conviction be reversed.

B. Forgery Defined

It is clear that "forgery is to be defined today as it was at common law", *see Gilbert v. United States*, 370 U.S. 650 (1962); *United States v. Jones*, 553 F.2d 351 (4th Cir.), *cert. denied*, 431 U.S. 968 (1977), and that common law forgery has three elements:

(1) a false making or alteration,

(2) with fraudulent intent,

(3) of a writing which, if genuine, might have legal effect.

United States v. McGovern, Nos. 81-1606 and 81-1607, slip opinion at 4 (3rd Cir. October 5, 1981).

It is equally clear that at common law, signing the name of another with the permission of the person whose name was signed did not constitute a "false making", and hence was not a forgery. *See, e.g., Gilbert v. United States*, 370 U.S. 650 (1962); *United States v. Lewis*, 592 F.2d 1282 (5th Cir. 1979); *United States v. Gilbreath*, 452 F.2d 992 (5th Cir. 1971); *Parker v. United States*, 297 F.2d 135 (5th Cir. 1961); *Selvidge v. United States*, 290 F.2d 894 (10th Cir. 1961); *United States v. Sonnenberg*, 158 F.2d 911 (3rd Cir. 1946); *United States v. Carney*, 328 F. Supp. 960 (D. Del. 1971), *aff'd per curiam*, 455 F.2d 925 (3rd Cir. 1972).

This rule has its basis in the law of agency: as long as the agent has the authority to sign the name of the principal, and as long as this authority is not exceeded and the instrument is not signed in disobedience of the instructions, there is no forgery. *Selvidge v. United States*, 290 F.2d 894 (10th Cir. 1961). This is true even if the endorser attempts to simulate the signature of the principal, *see Oquendo v. Federal Reserve Bank of New York*, 98 F.2d 708 (2d Cir. 1938), and even if the authority given is merely implicit, *see United States v. Sonnenberg*, 158 F.2d 911 (3rd Cir. 1946). The cases draw no distinction based upon the type of document signed by the agent.

C. The Court Forges a New Definition

In the case at bar, the conduct of John T. Scull was clearly outside the ambit of this forgery definition. As found by the district court, all acts performed by petitioner Scull, including signing McGovern's name on the traveler's checks, "were done with the knowledge, consent and assistance of defendant McGovern." *United States v. McGovern*, 505 F. Supp. 195 (W.D. Pa. 1981). Since signing the name of another with authority to do so is not forgery, and since Scull signed McGovern's name with his permission, Scull's actions did not constitute forgery.

However, the Third Circuit panel did not follow this well-trod route compelled both by logic and case law. Rather, the panel distinguished traveler's checks from all other documents and held that because traveler's checks are unique in that the purchaser agrees to countersign each check himself, Scull's action in this case was a forgery. McGovern's agreement to countersign each check himself "invalidate[d] his attempt to authorize another to sign his name". Hence, the panel reasoned, Scull had no authority to sign McGovern's name and a forgery was committed.

This ruling is an unprecedented, unwarranted and dangerous expansion of the definition of forgery. It is respectfully submitted that the panel decision—without support in case law or reason—has deviated from well-settled rules and has drawn a distinction based upon an irrelevant difference. A careful examination of the panel's distinction reveals its logical and precedential flaws, and compels the conclusion that review by this Court and reversal of the petitioner's conviction is mandated.

D. John Scull's John Hancock

As noted above, *regardless of the document signed*, the signature of the name of another with his permission cannot constitute forgery. In the case at bar, the Third Circuit panel's ruling ignores this precedent by allowing the type of document signed to play a role in determining whether a forgery was committed. Not only does this holding defy precedent, it defies logic and common sense as well.

The holding of the three judge panel is based upon the unique qualities of traveler's checks. Petitioner concedes that traveler's checks are unique, but respectfully suggests that with regard to the issue in the case at bar there is no "difference that makes a difference." The fact that traveler's checks are cashed on the credit of the issuer and the conformity of the countersignature with the original signature plays a role in determining whether a careful cashier accepts a check or not, but is not relevant to whether a signature with permission is a forgery.

First, there is neither rhyme nor reason to allowing the definition of forgery to turn on the question of on whose credit a check is cashed. This distinction simply makes no difference with regard to the issue. Second, the fact that a traveler's check is not to be cashed unless the countersignature conforms to the original signature makes traveler's checks no different than ordinary bank checks which are only to be cashed when the signature on the check conforms with the signature of one with power of attorney on file at the bank. In this regard, traveler's checks and bank checks are identical, and a bank check signed in another's name with permission to do so cannot constitute a forgery. *See Parker v. United States*, 297 F.2d 135 (5th Cir. 1961); *cf. United States v.*

Carney, 328 F. Supp. 960 (D. Del. 1971), *aff'd per curiam*, 455 F.2d 925 (3rd Cir. 1972) (implicit that one without power of attorney may be given authority to sign the name of another person as drawer on that person's checks, and that such signature cannot constitute forgery). Hence, the fact that a traveler's check is cashed "on the credit of the issuer together with the conformity of the negotiator's signature with that on the face of the instrument", *see United States v. McGovern*, Nos. 81-1606 and 81-1607, slip opinion at 5 (3rd Cir. October 5, 1981), should not make any difference with regard to whether a countersignature with permission can constitute a forgery.

Moreover, the ultimate conclusion drawn by the panel—that because the traveler's check contract denies the purchaser the right to authorize another to sign for him, the signature in this case was a forgery—is logically flawed. This contract provision is designed to enable a cashier to refuse to cash a traveler's check signed by a person other than the original signor even if the person represents that he has permission to do so. The provision is not that the purchaser cannot permit another to sign his name, for the power to do so is always with the individual; rather, it is provided that the cashier may refuse to honor the check if signed by someone other than the original signor, even if done so with permission. In other words, the contract provision does not and cannot remove the *power* of the purchaser to permit another to countersign his name, but it can and does remove the *duty* of the issuer or the cashier to honor the check if signed by someone other than the original purchaser. Again, a bank check provides an apt analogy. Just as the bank may refuse to honor a check signed by one who is

without power of attorney even if signed with permission, so the traveler's check issuer may refuse to honor a traveler's check under similar circumstances. Again, there is no reason for the panel's emphasis upon the irrelevant distinction between a bank check and a traveler's check. *See* Citibank traveler's check contract attached as Appendix E.

Hence, the fact that "a purported delegation [of authority to countersign a traveler's check] is of no effect under the laws of agency", *see United States v. McGovern*, Nos. 81-1606 and 81-1607, slip opinion at 5 (3rd Cir. October 5, 1981), is irrelevant as to whether a forgery is committed if a traveler's check is signed pursuant to such a "purported delegation". The premise that a delegation has no effect does not compel the conclusion that a signature based on an ineffective delegation may therefore constitute a forgery. The panel's conclusion in this regard has thus skipped an epistemological step and has therefore reached an unwarranted, unprecedented and flawed conclusion.

One who countersigns the name of another—the original signor—to a traveler's check has rendered an ineffective signature, but if the purchaser gave permission to do so there has been no "false writing" and hence no forgery. An ineffective signature may relieve the issuer of a traveler's check from the duty to honor that check, but in light of the common law definition of forgery, it does not and cannot follow that the signor is a forger if he had permission to countersign the name of the purchaser.

In short, the legal authority to give permission to effectively sign one's name and the actual authority to give permission to sign one's name are entirely different concepts. The former controls the duty of third parties to

honor the signature; the latter concerns the power of an individual to allow another person to sign his name. McGovern could not give Scull the legal authority to effectively countersign the traveler's checks in McGovern's name; the traveler's check contract precluded McGovern from creating a duty on the part of the traveler's check issuer to honor checks countersigned by anyone but McGovern. However, McGovern retained the power to allow Scull to sign McGovern's name—albeit ineffectively. The fact that the signature was ineffective does not make it a forgery.

Furthermore, it should make no difference that Scull deliberately deceived the cashier into believing that he was McGovern, since, as noted above, a signature with authority cannot constitute a forgery even if the signor attempts to deceive the cashier by imitating the principal's signature. *See Oquendo v. Federal Reserve Bank of New York*, 98 F.2d 708 (2d Cir. 1938). Scull's efforts to deceive the cashier may make his conduct culpable and may constitute violations of other statutes, but they do not and cannot make him guilty of forgery.

It is the solemn responsibility of our nation's courts to ensure that a defendant is punished only for violations of those statutes for which he has been indicted and under which he has been tried. *See United States v. Grissom*, 645 F.2d 461 (5th Cir. 1981). To allow Scull's conviction to stand simply because he may have intended to deceive the cashier is to cast aside this solemn responsibility.

It should be noted that had Congress wished to proscribe conduct like that of petitioner in the case at bar, it could have easily done so. For example, a statute which prohibited an interstate scheme to defraud by which one person countersigned the name of another on a traveler's check would have covered the "CITISCAM" situation.

However, Congress chose to proscribe only the interstate transportation of "any traveler's check bearing a forged countersignature" in 18 U.S.C. §2314. By so defining the crime, Congress has evidenced an intent to exclude conduct like that of the petitioner from the ambit of the statute. Petitioner's conviction under this statute therefore cannot stand.[2]

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[2] It should also be noted that the conduct of the petitioner may well have been criminally proscribed by other federal laws which were not cited in the indictment, as well as by a number of state statutes. For example, 18 U.S.C. §1341 prohibits mail fraud, and this statute has been defined to proscribe fraudulent schemes even if the alleged perpetrator did not himself mail the deceitful item, as long as use of the mails was a forseeable part of the scheme. *See, e.g., Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *United States v. Toney*, 598 F.2d 1349 (5th Cir. 1979); *cert. denied*, 444 U.S. 1033 (1980); *United States v. Cooper*, 596 F.2d 327 (8th Cir. 1979); *United States v. Talbott*, 590 F.2d 192 (6th Cir. 1978). In "CITISCAM", it can be argued that use of the mail to forward the traveler's checks to the bank for payment and to replace the allegedly stolen checks was indeed a forseeable and integral part of the scheme. *Cf. United States v. Adamo*, 534 F.2d 31 (3d Cir.) (fraudulent use of credit card), *cert. denied*, 429 U.S. 841 (1976). *See also* New York Penal Law §§190.60 (Scheme to Defraud in the Second Degree), 155.30 (Grand Larceny in the Third Degree), and 155.35 (Grand Larceny in the Second Degree), and similar Pennsylvania statutes. However, the government did not charge petitioner with violations of these statutes, but rather indicted him under a law which did not proscribe his conduct. This fatal error by the prosecution requires reversal of the conviction.

E. "A check, by any other name . . . . ."

The distinction drawn by the panel between traveler's checks and other checks would require different conclusions for virtually identical situations. For example, while "CITISCAM" was found to fall within the ambit of the statute, the panel's analysis compels the conclusion that the same cannot be said about a similar scheme using bank checks. Consider a scenario in which McGovern and Scull concoct a scheme whereby McGovern gives a number of his personal bank checks to Scull and gives Scull permission to cash these checks by signing McGovern's name. Scull, armed with McGovern's drivers license, then poses as McGovern and cashes the checks. Completing the scheme, McGovern then reports the checks as stolen and orders the bank to stop payment.

This scenario likewise presents a fraudulent scheme in which a check is signed with the permission of the person authorized to sign the check and in which the loss is borne by either the institution which cashes the check or the institution on which the check is drawn. In the hypothetical situation, the case law makes it clear—and the panel opinion in this case implicitly concedes—that there is no forgery; on the other hand, in "CITISCAM", the panel held that there was indeed a forgery. This disparate treatment of substantially identical situations is unwarranted and the result of an unsupported distinction of traveler's checks. Such a decision makes the criminal process tantamount to a roll of the dice: if the defendants are lucky enough—or clever enough—to have used bank checks in their scheme, they will have escaped liability under 18 U.S.C. §2314; if they were unlucky enough to have used traveler's checks, they are subject to prosecution under that statute. The severe sanctions and moral opprobrium of the criminal law should not rest on so arbitrary and trivial a distinction.

F. A Case of First Impression

The Third Circuit panel's decision cannot rely on precedent to support its distinction, since as noted by the trial court, this case is one of first impression in the courts. *See United States v. McGovern*, 505 F. Supp. 195 (W.D. Pa. 1981). This is not a case where a blank traveler's check has been stolen and completed by signing a fictitious or real name, *see, e.g., United States v. Law*, 435 F.2d 1264 (5th Cir. 1970); *United States ex rel. Brown v. Rundle*, 417 F.2d 1068 (5th Cir. 1969); *United States v. Franco*, 413 F.2d 282 (5th Cir. 1969); *Berry v. United States*, 271 F.2d 775 (5th Cir. 1959); *United States v. Hamilton*, 332 F. Supp. 1315 (W.D. Pa.), *aff'd per curiam*, 455 F.2d 1268 (3d Cir. 1972), nor is this a case in which the original signature is erased and a fictitious signature substituted in its place and countersigned below, *see, e.g., United States v. Anderson*, 527 F.2d 442 (5th Cir. 1976) (*per curiam*). In both of these situations—either because the traveler's checks were never issued to anyone, or because the signature of the person to whom the checks were issued was erased and a fictitious signature substituted—there was *no one* who could legitimately countersign the check. Hence, any signature was necessarily a false writing. On the other hand, in the case at bar, it is beyond dispute that McGovern could have countersigned the check, and, under the analysis in sections II(B), (C) and (D) above, had the power to delegate another to sign his name—albeit without legal effect. Hence, the opinions upon which the Third Circuit panel relied provide no precedent for its decision in this case.

Moreover, the circumstances of "CITISCAM" are a far cry from those in the case called by the trial court "[p]erhaps the closest analogy to the present case". *United States v. McGovern*, 505 F. Supp. 195 (W.D. Pa. 1981). In *United States v. Wilkins*, 213 F. Supp. 332

(S.D.N.Y. 1963), *aff'd per curiam*, 328 F.2d 120 (2d Cir. 1964), the individual who endorsed the check in the name of the payee had no permission to do so, but rather simply represented that he did in fact have permission. Scull does not dispute the conclusion that if he were without permission to sign McGovern's name, his signature would have constituted a forgery; but the trial court found—and the evidence clearly indicated—that Scull did have permission. This integral and key difference distinguishes any analogy drawn from *Wilkins*.

The panel decision in this case is without support in logic and case law. It is respectfully submitted that a careful examination of the court's analysis requires review by this Court and reversal of petitioner's conviction.

III. Conclusion

It has long been the rule that criminal statutes "must be strictly construed, and any ambiguity must be resolved in favor of lenity". *See United States v. Enmons*, 410 U.S. 396, 411 (1973); *United States v. Grissom*, 645 F.2d 461, 466 (5th Cir. 1981). The panel decision in this case has not only cast this interpretive guideline to the wind, it has taken pains to expand the definition of forgery to unprecedented proportions and to broaden greatly the conduct punishable under the statute. Petitioner's voluminous research has not uncovered a single case in which "forgery" was found to include the signing of another person's name with the permission of that person. By breaking new ground, the panel decision has also broken the rules of construction of penal statutes.

John Scull may have engaged in culpable conduct in this case. His actions may have constituted violations of various state and federal laws.[3] But the culpability of Scull's conduct and the violations of laws other than the one under which Scull was indicted and tried are not at issue here. Our nation's courts, charged with the solemn responsibility of ensuring that a defendant is convicted and punished only for violations of the statute charged in the indictment, cannot base their decisions simply on the feeling that a defendant has done something wrong. Our system of justice demands more.

John Scull has not devised a fool-proof way to "beat the system". Cases like his may be punished under other statutes and perhaps in other jurisdictions.[4] But he is not guilty of the crime with which he was charged and under which he was tried for the simple reason that the statute does not proscribe his conduct. To adapt Scull's

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[3] *See* note 2, *supra*.

[4] *See* note 2, *supra*.

conduct to fit the statute is to bend the law out of proportion and to stretch the ambit of a criminal statute which is to be strictly construed. To affirm petitioner's conviction is to take an unwarranted, unprecedented and improper step.

The conviction must be reversed.

Respectfully submitted,

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On the Petition

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit filed October 5, 1981.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1606 and 81-1607

UNITED STATES OF AMERICA

v.

McGOVERN, JAMES DANIEL a/k/a
JAMES D. PERINO
SCULL, JOHN THOMAS

JAMES DANIEL McGOVERN, *Appellant,* No. 81-1606

(D.C. Crim. No. 80-00168-01)

UNITED STATES OF AMERICA

v.

McGOVERN, JAMES DANIEL a/k/a
JAMES D. PERINO
SCULL, JOHN THOMAS

JOHN THOMAS SCULL, *Appellant,* No. 81-1607

(D.C. Crim. No. 80-00168-02)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)

September 24, 1981

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit filed October 5, 1981.

Before: ALDISERT, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*

(Filed October 5, 1981)

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Counsel for Appellee

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit filed October 5, 1981.

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The question for decision is whether the appellants' conduct constituted a violation of paragraph four of 18 U.S.C. §2314:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's checks bearing a forged countersignature . . . shall be fined . . . or imprisoned . . . or both.

Convicted in a bench trial, McGovern and Scull argue in this appeal that the government failed to prove the predicate of the federal statutory offense: common law forgery. Appellants contend that the existence of authority to sign another's name to an instrument defeats a forgery charge, and that here appellant McGovern, purchaser of the traveler's checks, authorized appellant Scull to sign McGovern's name to the checks. We will affirm essentially for the reasons set forth by Chief Judge Weber. *United States v. McGovern*, 505 F.Supp. 195 (W.D.Pa. 1981).

I.

In the modern idiom, the appellants' fascinating plan could be dubbed "CITISCAM," because the participants devised a novel method of defrauding Citibank Corporation and certain businesses. The motive for the operation was the existence of an $1,800 debt McGovern owed an increasingly impatient Scull. The scheme was obvious: McGovern would buy $2,400 (for good measure) in traveler's checks from a bank; Scull would sign

McGovern's name to the checks and cash them and McGovern would claim to the bank that he had lost the checks, knowing that according to highly advertised traveler's check policy the issuer would promptly "refund" his "lost" checks. If the scheme was successful, either the businesses or the issuer of the checks would bear the loss.

Citibank, one of the planned victims under the scheme, issued the checks to McGovern through a Niagara Falls, New York, bank. The purchase agreement that McGovern signed stated:

> The purchaser agrees to sign each check in the upper left corner at the time of purchase with the same signature used in signing this agreement; and to counter-sign each check in the lower left corner when cashed, in the presence of the person cashing it.

Not attuned to the consequences of crossing state lines, McGovern then proceeded to Erie, Pennsylvania, thereby vesting the federal authorities with jurisdiction over the conspirators' activities. There, tutored by McGovern, Scull practiced imitating McGovern's signature, and then, armed with his co-conspirator's driver's license as identification, Scull entered two Erie banks and a GTE store where he cashed the checks and collected $2,400. Playing out the scenario, McGovern then reported to the New York police that his checks had been stolen from his automobile while in Buffalo; one day later he reported the loss to Citibank and, not surprisingly, Citibank issued McGovern $2,400 in replacement checks.

II.

As explained in detail by Chief Judge Weber, forgery in §2314 means what the term meant under common law in 1823. *United States v. McGovern*, 505 F.Supp. 195, 196-97 (W.D.Pa. 1981) (citing *Gilbert v. United States*, 370 U.S. 650 (1962)). Common law forgery has three elements: (a) The false making or material alteration (b) with intent to defraud (c) of a writing which, if genuine, might be of legal efficacy. 505 F.Supp. at 196.

McGovern and Scull contend that under the facts, the first element cannot be established. They rely on the common law precept that authority to sign another's name to a written instrument negates a charge of forgery regardless of fraud or falsehood in the transaction. Whatever validity this argument may have in other contexts, *e.g.*, *see United States v. Sonnenberg*, 158 F.2d 911 (3d Cir. 1946) (implied authority to endorse war bonds); *Oquendo v. Federal Reserve Bank*, 98 F.2d 708 (2d Cir.), *cert. denied*, 305 U.S. 656 (1938) (fraudulently induced authority to sign check); *see also United States v. Carney*, 328 F.Supp. 960 (D.Del 1971), *aff'd per curiam*, 455 F.2d 925 (3d Cir. 1972); *Russel v. Second National Bank*, 136 N.J.L. 270, 55 A.2d 211 (1947), we do not believe that those cases control a traveler's check transaction.

The purchaser's agreement to sign each traveler's check at the time of purchase and to counter-sign the checks only in the presence of the person cashing them, in our view, invalidates his attempt to authorize another to sign his name. As the fifth circuit observed in *Berry v. United States*, 271 F.2d 775, 777 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960), traveler's checks are unique.

Unlike other negotiable instruments, they are cashed not on the credit of the negotiator, but on the credit of the issuer together with the conformity of the negotiator's signature with that on the face of the instrument. These instruments are negotiated freely because of the assured credit of the check issuer and relative ease of determining signature validity. The traveler's check contract clearly denies the purchaser the right to authorize another to sign for him and the reason seems clear; a representative signature complicates the negotiation process and thereby dilutes the advantage of ready acceptance. Without authority to delegate the check-cashing power to another, a purported delegation is of no effect under the law of agency. *See* Restatement (Second) of Agency §19; *see also United States v. Anderson*, 527 F.2d 442, 444 (5th Cir. 1976) (per curiam). Thus, the decisions holding that authority to sign another's name negates a charge of "false making" are *a fortiori* inapplicable to this case.

Moreover, under the facts presented here, the businesses cashing the checks were deliberately deceived into believing that the person signing the checks was the purchaser. They, as much as Citibank, were defrauded in the transaction because Scull was impersonating McGovern. This case, therefore, differs from cases in which the person accepting the instrument was informed of the purported authorization. If the authorization was valid, there would be no forgery and no defrauding of the cashing person. *See United States v. Wilkins*, 213 F.Supp. 332 (S.D.N.Y. 1963), *aff'd per curiam*, 328 F.2d 120 (2d Cir. 1964). Of course, a person who cashes a traveler's check in those circumstances is on notice that the issuer of the check may refuse to honor the in-

strument because of an invalid signature. But the knowledge of the cashing person that the person signing is acting in a representative capacity negates a charge of forgery. When the person signing the traveler's checks is an imposter, however, his unauthorized signature on a traveler's check, when accompanied by an intent to defraud, constitutes common law forgery.

McGovern, the purchaser of the traveler's checks, knew the effect his actions would have on Citibank and on the business cashing them—indeed, appellants conceded that this was the sole purpose of having Scull sign the checks. Scull was an imposter and possessed no authority to sign the checks because McGovern could not grant him this authority. When coupled with the appellants' intent to defraud, the unauthorized signature on the otherwise legally sufficient instruments constituted common law forgery.[1] The elements of the offense having been established we conclude that the convictions must stand.

III.

Accordingly, for the foregoing reasons and as more elaborately set forth by the district court, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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[1] We also reject appellants' argument that finding their conduct to be proscribed by 18 U.S.C. §2314 violates their rights to due process and equal protection. *See generally Rose v. Locke*, 423 U.S. 48, 49-50 (1975) (per curiam); *United States v. Mazurie*, 419 U.S. 544, 553 (1975).

APPENDIX B

Opinion of the United States District Court for the Western District of Pennsylvania, dated January 22, 1981.

UNITED STATES OF AMERICA

v.

JAMES DANIEL McGOVERN, JOHN THOMAS SCULL.

Crim. No. 80—168—Erie.

United States District Court,
W. D. Pennsylvania.

Jan. 22, 1981.

In prosecution of defendants for violation of the federal statute covering interstate transportation of forged travelers' checks, the District Court, Weber, Chief Judge, held that countersignature of defendant's name on travelers' checks by codefendant, who was given authority to sign by defendant as part of scheme to defraud issuer of travelers' checks, constituted a forgery under federal travelers' checks statute.

Defendants adjudged guilty.

Receiving Stolen Goods—2

Countersignature of defendant's name on travelers' checks by codefendant, who was given authority to sign by defendant as part of scheme to defraud issuer of travelers' checks, constituted a forgery under federal travelers' checks statute. 18 U.S.C.A. §2314.

Appendix B—Opinion of the United States District Court for the Western District of Pennsylvania. dated January 22, 1981.

Robert J. Cindrich, U. S. Atty., John P. Garhart, Asst. U. S. Atty., Pittsburgh, Pa., for plaintiff.

Robert L. Lackey, Asst. Federal Public Defender, Pittsburgh, Pa., for McGovern. Philip B. Friedman, Erie, Pa., for Scull.

OPINION

WEBER, Chief Judge.

The defendants here are charged with violation of the federal statute covering the interstate transportation of forged travelers' checks, with unlawful or fraudulent intent, under 18 U.S.C. §2314 par. four. Only the element of forgery is at issue here.

Neither the ingenuity of counsel nor the laborious plowing of the court has discovered a similar scheme in the reported cases. The court cannot comprehend the actions of the defendants in crossing a state line as being done deliberately as part of a scheme to establish a defense to federal prosecution but that suggestion now faces us. The same acts if done within a single state would subject defendants to a variety of state charges. Nor, as shown by the conclusion we reach here, can we accept the suggestion that no federal prosecutor would pursue an action for violation of the federal travelers' check statute under the facts set forth herein.

The matter was heard by the court without jury upon the waiver of jury trial made by the defendants in open court. From the evidence the court makes the following:

Appendix B—Opinion of the United States District Court for the Western District of Pennsylvania, dated January 22, 1981.

FINDINGS OF FACTS

1. In August of 1978 defendant McGovern owed money to defendant Scull.

2. In order to repay the debt defendants McGovern and Scull devised a scheme to obtain funds through a transfer of travelers' checks.

3. Under the scheme Scull provided McGovern with cash in the amount of $2424.00 to purchase $2400.00 in travelers' checks issued to McGovern.

4. On August 30, 1978 twenty four travelers' checks in the amount of $100.00 each were issued by a branch of Citibank in Niagara Falls, New York to James McGovern who signed each of the checks in the upper right hand corner. These are the checks described in the indictment.

5. At the time of the issue of the checks to defendant McGovern, defendant Scull practised imitating McGovern's signature.

6. On the same day, August 30, 1978, defendants McGovern and Scull traveled together from Niagara Falls, New York to Erie, Pennsylvania.

7. In Erie, Pennsylvania on August 30, 1978, defendant McGovern gave defendant Scull McGovern's driver's license so that Scull could identify himself as McGovern.

8. On August 30, 1978 defendant Scull entered two banks in Erie, Pennsylvania, identified himself as McGovern with the aid of McGovern's driver's license, presented the travelers' checks for cashing, signed McGovern's signature on each check in the space pro-

vided for countersignature and received $2400 in cash. Scull was identified by one teller and his fingerprints appeared on various of the travelers' checks cashed at both the banks.

9. All the acts performed by defendant Scull were done with the knowledge, consent and assistance of defendant McGovern.

10. The 24 travelers' checks which were cashed in Erie, Pennsylvania banks were forwarded through banking channels to New York, N. Y. for ultimate collection.

11. After cashing the checks both defendants returned to the state of New York.

12. On August 31, 1978, defendant McGovern filed a report with local police in New York state saying that the checks had been stolen from his automobile at the Buffalo, N. Y. airport on August 30, 1978.

13. On September 1, 1978, defendant McGovern reported to a branch of Citibank in Amherst, N. Y. that the travelers' checks had been stolen from his auto at the Buffalo, N. Y. airport on August 30, 1978 and that the theft had been reported to the police.

14. On September 1, 1978, Citibank issued $2400 worth of replacement travelers' checks to defendant McGovern at his request based on his theft report.

15. On February 23, 1979, after being advised of his rights, defendant McGovern admitted the above facts to an agent of the F.B.I.

Appendix B—Opinion of the United States District Court for the Western District of Pennsylvania, dated January 22, 1981.

DISCUSSION

The defendants here were charged in the indictment under paragraph four of 18 U.S.C. §2314, which defines as an offense:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any travelers' checks bearing a forged countersignature . . .

18 U.S.C. §2314 was amended in 1968 by the addition of the above paragraph four to cover a situation where judicial construction excluded from the other provisions of Section 2314 a validly executed instrument bearing a forged countersignature. *Streett v. U. S.*, 331 F.2d 151 (8th Cir. 1964).

The legislative history of paragraph four shows that it was intended to cover only those instruments commonly known as travelers' checks. U.S.Code Congressional and Administrative News, pp. 3654-55, 3656-57 (1968).

A number of cases have been cited to us which were decided prior to the 1968 amendment and are mostly of limited value because they were brought under paragraph three of Section 2314 which includes in the offense the words "falsely made, forged, altered, or counterfeited securities". A distinction is now drawn between the forgery requirement at paragraph four and the falsely made requirement of paragraph three at §2314. *U. S. v. Huntley*, 535 F.2d 1400 (5th Cir. 1976).

Thus, we are limited to the question of whether the signature described in the finding of fact constitutes a "forgery" under paragraph four of Section 2314.

Appendix B—Opinion of the United States District Court for the Western District of Pennsylvania, dated January 22, 1981.

In *Gilbert v. U. S.*, 370 U.S. 650, 82 S.Ct. 1399, 8 L.Ed.2d 750 (1962) it was held that the crime of forgery is defined by the common law as it existed in 1823.

> Forgery is not defined in the statute. Forgery is generally defined as 'the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might be of legal efficacy, or the foundation of legal liability.' 37 C.J.S. Forgery §1..... It has been held that 'forged' and 'falsely made' as used in the statute are 'homogenous, partaking of each other .... synonymously construed to describe a spurious or fictitious making as distinguished from a false or fraudulent statement'. *Marteney v. United States*, 216 F.2d 760, 763 (10th Cir. 1954). *Edge v. U. S.*, 270 F.2d 837 (5th Cir. 1959).

A series of cases cited by defendants stem from *U. S. v. Sonnenberg*, 158 F.2d 911 (3rd Cir. 1946), in which the defendants were charged with forgery under 18 U.S.C. §73. The essential question in that case was the existence of authority to sign another's name. The court, finding such authority, and further finding no evidence of intent to defraud, reversed the conviction.

The cases cited by the defendants all rely on the principal set forth in *Sonnenberg*. All have as their essential question the existence of authority, express authority or implied authority, to sign another's name to a document, and the adequacy of the charge given to the jury on the question of authority. See, *United States v. Gilbreath*, 452 F.2d 992 (5th Cir. 1971); *United States v. Lewis*, 592 F.2d 1282 (5th Cir. 1979).

However, in the present case we are not dealing with the question of the authority of Scull to sign McGovern's name to the travelers' checks. Both defendants insist that such authority was given and that therefore there can be no forgery. However, the very authority given was part of the scheme to defraud.

If this claimed authority were valid and legal there would be no need for Scull to practice making an imitation of McGovern's signature, or to make the false representation to the payee of the travelers check by presentation of McGovern's driver's license that he was in fact McGovern.

Aside from the cases dealing with the existence of authority we find no cases on the exact point of whether the countersignature of the drawer's name made with the consent of the drawer at the time but with the specific knowledge that that consent would be repudiated as part of a scheme to defraud, constitutes forgery as defined in the statute. Under the evidence in this case the intent to defraud is not contested.

Perhaps the closest analogy to the present case is *United States v. Wilkins*, 213 F.Supp. 332 (S.D.N.Y. 1963), *aff'd per curiam*, 328 F.2d 120 (2d Cir. 1964). In *Wilkins* it was argued that there was no forgery because the person cashing the check knew that the person endorsing the check with the name of the payee was not the named payee, but took the check upon the oral representation that the endorser had authority to sign the payee's name on the payee's behalf. After an extensive review of the common law precedents, Judge Bryan concluded that:

> The emphasis on the instrument itself which is of ancient origin (See *Rex v. Jones and Palmer*, 1 Leach 366, 168 Eng. Rep. 285 (1785)) is pointed up by what appears to have been the reasons for declaring forgery to be a crime in the first place—the need to protect seal and signature so as to safeguard the holder, and the commercial necessity for making the negotiability of instruments feasible as a practical matter.
> *Id.* at 338.

The court concluded that the oral representations of authority were wholly irrelevant. The signature was placed on the instrument to make it appear that it was a valid and genuine instrument capable of negotiation and requiring ultimate payment by the drawee, when in fact it was not. "I see nothing in the common law which brings this case within the category of 'per procuration' or agency endorsements without authority held not to be a forgery in such cases as *Gilbert (v. United States*, 370 U.S. 650, 82 S.Ct. 1399, 8 L.Ed.2d 750 (1962)); *Selvidge (v. United States*, 290 F.2d 894 (10th Cir. 1961)); and *Regina v. White* (2 Car. & K. 404, 175 Eng.Rep. 167, (1847))." *Id.* at 338.

Therefore the countersignature of McGovern's name, although made with his knowledge and consent, was made to give the instrument the appearance of regularity and validity. This is fortified by the attempt to imitate McGovern's handwriting. The signature was false in that

the person signing was not in fact McGovern. It was done so that the instrument would appear to be of legal efficacy so that payment thereof could be made on presentation but with the intention of defrauding the ultimate drawee by a denial of its genuineness.

The signing of the drawer's countersignature by another was obviously material to the scheme to defraud.

CONCLUSIONS OF LAW

1. The writing made by defendant John Thomas Scull of the words "James D. McGovern" on the space provided for countersignature on the travelers' checks described in the indictment was not made by the person whose signature it was represented to be, and it was made with the intention of deceiving any person dealing with the documents that the instrument was valid, and was made with the knowledge that the validity of the writing as the signature of James D. McGovern and the authority to write such signature would be denied. The travelers' checks as described in the indictment were therefore forged.

2. The forgery of the travelers' checks described in the indictment was done with unlawful or fraudulent intent to aid defendants in carrying out a scheme to defraud the drawee and to obtain money to which they were not entitled.

3. By cashing the forged travelers' checks in Pennsylvania, the defendants caused forged travelers' checks, after the forgery, to be transported in interstate commerce from Pennsylvania to New York in order to effect payment of them by the drawee.

4. The actions described in the findings of fact herein constitute a violation of the provisions of paragraph four of 18 U.S.C. §2314.

5. Defendant James Daniel McGovern is adjudged guilty of Count 1 of the indictment.

6. Defendant John Thomas Scull is adjudged guilty of Count 1 of the indictment.

7. Counts 2 through 24 of the indictment are dismissed as miltiplicious.

APPENDIX C

Judgment of the United States Court of Appeals for the Third Circuit, dated October 5, 1981 and issued in lieu of a formal mandate as to Petitioner Scull on December 7, 1981.

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 81-1606/7

UNITED STATES OF AMERICA

vs.

McGOVERN, JAMES DANIEL a/k/a
JAMES D. PERINO
SCULL, JOHN THOMAS

JAMES DANIEL McGOVERN, Appellant in No. 81-1606
(D. C. Crim. No. 80-00168-01)

JOHN THOMAS SCULL, Appellant in No. 81-1607
(D. C. Crim. No. 80-00168-02)

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Aldisert, Higginbotham and Sloviter,
Circuit Judges.

Appendix C—Judgment of the United States Court of Appeals for the Third Circuit, dated October 5, 1981 and issued in lieu of a formal mandate as to Petitioner Scull on December 7, 1981.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on September 24, 1981.

On consideration whereof, it is now here ordered and adjudged by this court that the judgments of conviction and sentence of the said District Court filed March 13, 1981, be, and the same are hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

October 5, 1981

APPENDIX C

Judgment of the United States Court of Appeals for the Third Circuit, dated October 5, 1981 and issued in lieu of a formal mandate as to Petitioner Scull on December 7, 1981.

UNITED STATES COURT OF APPEALS

For the Third Circuit

Nos. 81-1606/7

UNITED STATES OF AMERICA

vs.

McGOVERN, JAMES DANIEL a/k/a
JAMES D. PERINO
SCULL, JOHN THOMAS

JAMES DANIEL McGOVERN, Appellant in No. 81-1606
(D. C. Crim. No. 80-00168-01)

JOHN THOMAS SCULL, Appellant in No. 81-1607
(D. C. Crim. No. 80-00168-02)

On Appeal From the United States District Court
for the Western District of Pennsylvania

Present: Aldisert, Higginbotham and Sloviter,
Circuit Judges.

Appendix C—Judgment of the United States Court of Appeals for the Third Circuit, dated October 5, 1981 and issued in lieu of a formal mandate as to Petition Scull on December 7, 1981.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on September 24, 1981.

On consideration whereof, it is now here ordered and adjudged by this court that the judgments of conviction and sentence of the said District Court filed March 13, 1981, be, and the same are hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

October 5, 1981

Certified as a true copy and issued in lieu of a formal mandate as to No. 81-1607 on December 7, 1981.

SALLY MRVOS

Test:

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D

Denial of Petition for Releasing and Suggestion for Rehearing *En Banc* by the United States Court of Appeals for the Third Circuit, dated November 27, 1981.

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 81-1607

UNITED STATES OF AMERICA

vs.

McGOVERN, JAMES DANIEL a/k/a
JAMES D. PERINO
SCULL, JOHN THOMAS

JOHN THOMAS SCULL, *Appellant.*
(W. D. Pa. D. C. Crim. No. 80-00168-02)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

Appendix D—Denial of Petition for Releasing and Suggestion for Rehearing En Banc by the United States Court of Appeals for the Third Circuit, dated November 27, 1981.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ALDISERT
Judge

Dated: November 27, 1981

APPENDIX E

Citibank Traveler's Check Contract.

CITICORP SERVICES, INCORPORATED
AFFILIATE OF CITIBANK, N.A.

TRAVELERS CHECKS PURCHASE AGREEMENT
CHECKS IN SEQUENCE STARTING WITH NUMBER

PURCHASER AGREES TO TERMS AND CONDITIONS ON REVERSE.

PURCHASER'S SIGNATURE _____

6000-094-636

5 *(FIVE)* $10
TRAVELERS CHECKS

$50.00

REFUND INSTRUCTIONS
IMPORTANT—IN THE EVENT OF LOSS OR THEFT OF TRAVELERS CHECKS

A. We suggest you report loss or theft to the local police.
B. If funds urgently needed:
1. Bring this copy to the nearest *First National City Travelers Check Pre-Authorized Refund Center* (wherever *First National City Travelers Checks* are sold). All refund centers are pre-authorized to give you a refund for part or in most cases all of the amount lost or stolen. If you receive a partial refund and are still in urgent need of the balance of your loss, the Refund Center will contact Citicorp Services Headquarters, at our expense, for authorization of a prompt refund of your balance. For names and addresses of refund centers in the continental U.S. call toll free, 800-221-2566. (In New York State call collect 212-669-6068). Elsewhere, for information concerning Refund Centers inquire at your hotel, your country's Embassy or Consulate or contact a Citibank, N.A. branch—OR
2. Wire Citicorp Services, Incorporated, 399 Park Ave., N.Y. 10043 (Cable REFUNDCITI New York). Give full serial numbers of lost checks or if not available, the date and place of purchase.
C. In the event your refund is not urgently needed: 1. Immediately advise our refund department giving all facts, or 2. Obtain refund application at any *First National City Travelers Check* Selling Agent, complete fully and forward at once to CITICORP SERVICES, INCORPORATED, Refund Department, Box 2202, *New York*, N.Y. 10043.

DATE OF SALE: _____

PURCHASER'S COPY • Read Purchase Agreement on reverse. • For your protection immediately sign each check in the upper left corner. • Countersign only in the presence of person accepting check. • Guard checks as you would a like amount of cash.

CAUTION: Carry this form separately from Checks. This copy must be presented for pre-authorized refund.

PURCHASE AGREEMENT—READ CAREFULLY

THE PURCHASER AGREES:

1. to sign each check in the upper left corner at the time of purchase with the same signature used in signing this agreement;
2. to countersign each check in the lower left corner only when cashed, in the presence of the person cashing it;
3. to notify immediately CITICORP SERVICES, INCORPORATED, Refund Department, Box 2202, New York, N.Y. 10043, or any of its refund centers, of the loss or theft of any checks, giving their serial numbers and the circumstances thereof;
4. to present serial numbers of lost or stolen checks to CITICORP SERVICES, INCORPORATED, or any of its refund agents, at time of making refund application and in the case of pre-authorized refunds, this Purchaser's Copy of this agreement;
5. that if the PURCHASER fails to perform any of the above obligations or parts with any check in an illegal transaction, a wager or game of chance, the ISSUER shall not be required to make any refund to the PURCHASER;
6. that the ISSUER shall not be required to "stop payment" on any check for any reason, and may pay any check when the signature and countersignature thereon are signed by the same individual, whether or not the PURCHASER;
7. that this Purchase Agreement and any disputes arising hereunder shall be governed by the laws of the State of New York, [U.S.A.]

FIRST NATIONAL CITY TRAVELERS CHECKS
45,000 PRE-AUTHORIZED REFUND CENTERS WORLDWIDE